STANDARD PRACTICE OF USING THE SALE PROCEEDS TO PAY OFF THE EXISTING MORTGAGES ON THE SELLER'S PROPERTY AFTER THE CLOSING UPHELD BY THE MAJORITY; THE DISSENT ARGUED THE STANDARD PRACTICE VIOLATES THE TERMS OF THE STANDARD PURCHASE AND SALE AGREEMENT WHICH REQUIRES THE PROPERTY TO BE UNENCUMBERED AT THE CLOSING (THIRD DEPT).

The Third Department, affirming the grant of summary judgment to plaintiff seller, over a partial dissent, determined the standard real estate purchase and sale contract incorporates the standard practice of using the sale proceeds to pay off any mortgages on the property, even though those liens are not removed until after the closing. The defendant argued the plaintiff's failure to turn over the property free of the mortgages at the time of the closing was a breach of the explicit terms of the contract. The dissent agreed. The decision includes a detailed and comprehensive discussion of the standard purchase and sale agreement and the standard closing practice:

> Defendant argues that plaintiff did not have a marketable title at closing, as she could only provide a marketable title, as required under the contract, by providing a satisfaction of each mortgage lien at closing. However, this position would necessarily have required plaintiff to pay off each mortgage in advance and secure each satisfaction, and, in our view, is inconsistent with both the contract and the conduct of the parties.
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> It is significant that the parties used a "Standard Form Contract for Purchase and Sale of Real Estate" produced by the Capital Region Multiple Listing Service, Inc. … . Use of this standard form reflects the parties' intent to embrace the common practice developed over the years in the real estate closing realm … . This common practice with respect to the existing mortgage liens is as follows — the seller obtains payoff letters from respective lenders, the purchaser brings corresponding bank checks to the closing payable to each lender, and either the title insurance agent or the seller's counsel processes those payments to secure the required mortgage satisfaction … . Within 30 days of receipt of payment, the lenders are statutorily mandated to have a mortgage satisfaction "presented for recording to the recording officer of the county where the mortgage is recorded" (RPAPL 1921 [1] [a]). This protocol is consistent with the reality that the pertinent closing documents — the deed and the mortgage satisfactions — are recorded after the closing (see Real Property Law § 291). * * *
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> The concluding point is that defendant had documented assurance that the marketable title was being provided. Under these circumstances, we find that plaintiff duly performed under the contract. Defendant's refusal to complete the transaction constituted a breach of contract. As such, Supreme Court properly granted plaintiff's motion for summary judgment. Prendergast v Swiencicky, 2020 NY Slip Op 02686, Third Dept 5-7-20

THE APPEAL WAS RENDERED MOOT BY DEFENDANT'S TRANSFER OF THE PROPERTY AFTER SUPREME COURT RULED DEFENDANT HAD TITLE TO THE PROPERTY (THIRD DEPT).

The Third Department dismissed the appeal as moot. Property which had been validly foreclosed by defendant was transferred to a third party. Plaintiff had brought an action pursuant to Real Property Actions and Proceedings Law (RPAPL) Article 15 to determine its rights to a portion of the foreclosed property. Supreme Court granted defendant's motion for summary judgment on its counterclaim for strict foreclosure (RPAPL 1352) and plaintiff appealed. The appeal was deemed moot and dismissed because defendant had a right to transfer the property after Supreme Court's ruling:

> [T]he jurisdiction of this Court extends only to live controversies and, as such, an appeal will be considered moot unless an adjudication of the merits will result in immediate and practical consequences to the parties" … . "Since the ability to transfer clear title is a natural incident of [property] ownership, it follows that when a complaint involving title to or the right to possess and enjoy real property has been dismissed on the merits and there is no outstanding notice of pendency or stay, the property owner has a right to transfer or otherwise dispose of the property unrestricted by the dismissed claim" … . "'[A] purchaser's actual knowledge of litigation and a pending appeal is not legally significant and[,] absent a validly recorded notice of pendency, an owner has the ability to transfer clear title'" … .
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> Here, Supreme Court canceled plaintiff's notice of pendency and this Court denied his motion for a stay pending appeal. Therefore, defendants had the right to transfer the property when they did, and the purchaser obtained clear title despite its knowledge of the pending appeals. Govel v Trustco Bank, 2020 NY Slip Op 02306, Third Dept 4-16-20

IN THE CONTEXT OF AN APPLICATION FOR A PRELIMINARY INJUNCTION SUPREME COURT SHOULD NOT HAVE GRANTED THE ULTIMATE RELIEF SOUGHT; THE CRITERIA FOR A PRELIMINARY INJUNCTION WERE NOT MET (SECOND DEPT).

The Second Department, reversing Supreme Court, determined Supreme Court should not have ordered the return of the down payment to the buyer (Berman) pursuant to the purchase contract in the context of granting a preliminary injunction. First, by granting the ultimate relief requested Supreme Court had effectively granted summary judgment before issue was joined. Second the criteria for a preliminary injunction were not met. The purchase contract allowed the termination of the agreement and the return of the down payment if three conditions were met. Berman alleged two of the conditions were met and the third was impossible:

> Berman failed to demonstrate his entitlement to temporary injunctive relief pursuant to CPLR 6301, as he failed to establish any of the three required elements for such relief: (1) likelihood of ultimate success on the merits, (2) irreparable injury absent granting of a preliminary injunction, (3) and a balancing of equities in his favor … . …
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> Berman failed to demonstrate irreparable injury, as the loss of a down payment is not an irreparable harm since the injured party could be made whole by a money judgment … . …
>
> While Berman contends that it was impossible to obtain a Phase II Assessment within the required time, he failed to demonstrate a likelihood of success in establishing that it was impossible to obtain the report. …
>
> Finally, Berman failed to show that the balancing of equities was in his favor. Berman v TRG Waterfront Lender, LLC, 2020 NY Slip Op 01902, Second Dept 3-18-20

CONTRARY TO SUPREME COURT'S RULING, THE PURCHASE CONTRACT DID NOT INCLUDE A CLAUSE LIMITING PLAINTIFF'S REMEDY FOR A BREACH TO RETAINING THE DEPOSIT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the purchase contract did not have a limitation of remedies clause restricting plaintiff's damages for a breach to retaining the deposit:

> A limitation of remedies "will not be implied and to be enforceable must be clearly, explicitly and unambiguously expressed in a contract"… . Indeed, "[s]uch clauses are . . . strictly construed against the party seeking to avoid liability" (id. at 219), and " a provision must be included in the agreement limiting a party's remedies to those specified in the contract in order for courts to find that th[o]se remedies are exclusive' " … . Here, nothing in the contract stated that plaintiff's contractual right to retain the deposit upon defendant's breach was plaintiff's sole and exclusive remedy for such a breach. The court thus erred in granting the cross motion on that ground … . Lundy Dev. & Prop. Mgt., LLC v Cor Real Prop. Co., LLC, 2020 NY Slip Op 01751, Fourth Dept 3-13-20

CLASS ACTION AGAINST NYC HOUSING AUTHORITY FOR BREACH OF THE WARRANTY OF HABITABILITY RE: LOSS OF HEAT AND/OR HOT WATER GOES FORWARD (FIRST DEPT).

The First Department, reversing Supreme Court, determined the breach of the warranty of habitability cause of action should not have been dismissed . The plaintiff's motion for certification of the "damages class" was granted. The class action concerned the loss of heat and/or hot water in NYC Housing Authority properties:

> In order to prove a claim for breach of the warranty of habitability, plaintiffs must show the extensiveness of the breach, the manner in which it affected the health, welfare or safety of the tenants, and the measures taken by the landlord to alleviate the violation … .
>
> NYCHA conceded that 80% of its housing units experienced heat and/or hot water outages during the relevant period, which demonstrates that the problems that affected each class member were system-wide. Thus, much of the proof will likely concern NYCHA's overall deficiencies, rather than the breakdown of individual heating systems in individual buildings. The need to conduct individualized damages inquiries does not prevent class certification as long as common issues of liability predominate … .

In any event, the heating systems that failed served multiple housing units, and proof of NYCHA's efforts to repair each system will be common to numerous class members. In order to address any concerns with the size or disparity of the class, the court can designate subclasses consisting of tenants of a particular NYCHA complex, development or building … .

Moreover, class action treatment is the most efficient method for adjudicating the claims of class members who lack the resources to bring individual actions for the small recovery they might obtain … . Diamond v New York City Hous. Auth., 2020 NY Slip Op 00376, First Dept 1-21-20

INSURANCE REGULATION WHICH PROHIBITS TITLE INSURERS FROM PROVIDING VALUABLE INDUCEMENTS TO ATTRACT TITLE INSURANCE BUSINESS IS NOT UNCONSTITUTIONALLY VAGUE, SUPREME COURT REVERSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined Insurance Regulation 208 (11 NYCRR part 228), which prohibits title insurers from providing valuable inducements to attract title insurance business, is not unconstitutionally vague:

Petitioners contend that section 228.2(c) is unconstitutionally vague in setting forth a non-exhaustive list of activities that are "permissible, provided[,]" among other things, that they are "reasonable and customary, and not lavish or excessive" … . The court should have rejected this vagueness challenge, since section 228.2(c) "is sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden," and "the enactment provides officials with clear standards for enforcement so as to avoid resolution on an ad hoc and subjective basis" … . … [T}he words "lavish" and "excessive," standing in clear contrast with the word "reasonable," provide adequate notice of the type of behavior that is proscribed. The word "customary" also sets forth a standard that can be understood by an ordinary person … . …

The provisions of section 228.2(c) generally permitting advertising, charitable contributions, and political contributions are consistent with the right to free speech under the First Amendment to the United States Constitution and article I, § 8 of the New York Constitution. … The content-neutral provisions at issue in this case are narrowly tailored to the substantial government interest of clarifying a statute intended to "prevent consumers from being required to subsidize unscrupulous exchanges of valuable things for real estate professionals" … , and that interest is "unrelated to the suppression of free expression" … . Matter of New York State Land Tit. Assn., Inc. v New York State Dept. of Fin. Servs., 2019 NY Slip Op 09366, First Dept 12-26-19

THE DEMAND FOR THE RETURN OF THE DEPOSIT UNDER A REAL ESTATE PURCHASE CONTRACT WAS AN ANTICIPATORY BREACH OF THE CONTRACT AND PLAINTIFF WAS ENTITLED TO KEEP THE DEPOSIT AS LIQUIDATED DAMAGES (SECOND DEPT).

The Second Department determined defendant's demand for the return of its deposit in a real estate transaction was an anticipatory breach of the purchase agreement entitling plaintiff to retain the deposit as liquidated damages. Plaintiff, Lamarche Food, had represented that it was a New York corporation authorized to do business in New York. The corporation had been dissolved in 1992. For that reason defendant claimed plaintiff had breached the contract and demanded the return of the deposit. However, pursuant to Business Corporation Law 1006, a dissolved corporation may continue to function for the purpose of winding up affairs. Apparently defendant acknowledged the "winding up affairs" issue and argued only that its demand for a return of the deposit was not an anticipatory breach:

By letter dated June 23, 2017, a new attorney for the defendant informed the plaintiffs' attorney that Lamarche Food had defaulted on its obligations under the contract of sale inasmuch as it had represented therein that it was a New York corporation authorized to carry on its business in New York, with all the power and authority to enter into and perform the contract, and yet Lamarche Food was dissolved on June 24, 1992, and, therefore, was not a registered corporation in New York capable of engaging in new business. The defendant's attorney further stated that in light of the breach, the defendant demanded a refund of its deposit within 10 days. * * *

On appeal, the defendant does not dispute that Lamarche Food could continue to function for the purpose of selling the subject property as part of its winding up of the corporation's affairs. Rather, the defendant contends that its June 23, 2017, letter to the plaintiffs' attorney did not constitute an anticipatory breach of the contract of sale. "An anticipatory breach of contract by a promisor is a repudiation of [a] contractual duty before the time fixed in the contract for . . . performance has arrived" … . "For an anticipatory repudiation to be deemed to have occurred, the expression of intent not to perform by the repudiator must be positive and

unequivocal'" ... . We agree with the Supreme Court's determination that the June 23, 2017, letter reflected a positive and unequivocal repudiation of the contract by the defendant ... , thereby, under the terms of the contract, entitling the plaintiffs to retain the deposit as liquidated damages for the defendant's anticipatory breach. Lamarche Food Prods. Corp. v 438 Union, LLC, 2019 NY Slip Op 08995, Second Dept 12-18-19

ALTHOUGH THE CONTRACT WAS NEVER SIGNED, IT IS CLEAR THE PARTIES INTENDED TO BE BOUND BY IT (FIRST DEPT)

The First Department noted that a contract need not be signed to be valid. Here the contract was a "termination agreement" which addressed a real estate broker's entitlement to commissions for sales pending upon termination:

> It is true that neither party signed the Termination Agreement. However, where the evidence supports a finding of intent to be bound, a contract will be unenforceable for lack of signature only if the parties "positive[ly] agree[d] that it should not be binding until so reduced to writing and formally executed" ... . While the Termination Agreement contained a counterparts clause and signature lines indicating that it could be accepted by signature and countersignature, it did not positively state that the parties could assent only by signing. By contrast, the Engagement Agreement, also drafted by defendants, expressly provided that "in unsigned form [it] does not become an offer of any kind and does not become capable of acceptance." Thus, defendants knew how to draft an agreement that could be accepted only by signature, but they did not so draft the Termination Agreement. The evidence, i.e., the parties' months-long email exchanges, during which plaintiff submitted his list of pending transactions, defendants drafted the Termination Agreement and forwarded it to plaintiff, and the parties disagreed about the extent to which transactions listed by plaintiff were covered, supports a finding that the parties intended to be bound by the Termination Agreement, despite their failure to sign it ... . Lerner v Newmark & Co. Real Estate, Inc., 2019 NY Slip Op 08611, First Dept 12-3-19

FOUR CLASSES PROPERLY CERTIFIED TO BRING CLASS ACTION SUITS BASED UPON THE CONTAMINATION OF AIR, WATER, REAL PROPERTY AND PEOPLE WITH TOXIC CHEMICALS (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Lynch, determined that Supreme Court properly certified four classes bring class action suits against a manufacturer alleging the contamination of water, air, real property and people with toxic chemicals, PFOA and PFOS:

> Plaintiffs, residents of the Town, commenced this action as a proposed class action, alleging that defendant's use and improper disposal of PFOA and PFOS caused personal injury and property damage. In their complaint, plaintiffs proposed four classes: (1) a public water property damage class; (2) a private well water property damage class; (3) a private well nuisance class; and (4) a PFOA invasion injury class. Generally, the putative class members were individuals who owned or leased property in the Town or who ingested contaminated municipal or well water or inhaled PFOA or PFOS particulates in the Town and had demonstrable evidence of elevated levels of the chemical in their blood system. * * *
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> We agree with Supreme Court's determination that, in addition to those questions common to the property classes, the answers to certain additional common questions will be applicable to all members of the invasion injury class, for example: (1) whether medical monitoring is an available remedy; (2) the extent of the health hazard presented by exposure to PFOA; and (3) whether the members of the class are at significant increased risk for disease based on the excess accumulation of PFOA in their bodies. Although defendant contends that there are myriad factual questions that are not common to the class, we do not agree that those predominate. Importantly, this is not a case where there is an issue of fact regarding exposure — rather, each class member must establish exposure and accumulation through blood work ... . Burdick v Tonoga, Inc., 2019 NY Slip Op 08461, Third Dept 11-21-19

DEFENDANTS DID NOT DEMONSTRATE THAT THE DOCTRINE OF ECONOMIC

DISTRESS VOIDED THE PURCHASE AGREEMENT; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS BREACH OF CONTRACT ACTION SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined that the criteria for the doctrine of economic duress to void a contract were not met by the defendants. The defendants had entered an agreement to purchase four McDonald's restaurants from plaintiffs. The defendants alleged they agreed to an amendment of the contract because of the actions of the plaintiffs which amounted to economic distress:

> A party seeking to void a contract on the basis of economic duress must show that he or she was compelled to agree to it because of a wrongful threat precluding the exercise of his or her free will … . "The existence of economic duress is demonstrated by proof that one party to a contract has threatened to breach the agreement by withholding performance unless the other party agrees to some further demand" … . A mere threat to breach a contract, however, does not amount to economic duress if the party who has been threatened can obtain performance of the contract from another source and pursue normal legal remedies for a breach of contract … . …
>
> As the parties relying on economic duress, defendants bore the burden of proving that the agreement could not have been performed by another party. Defendants, however, failed to tender any proof in this regard. …
>
> The record also fails to establish that other legal remedies were not available to defendants. Indeed, [one defendant] testified that, before agreeing to the amendment, [defendants] weighed whether to take possession of the restaurants and then sue to have the original agreement enforced or not to take possession and then sue plaintiffs for specific performance. The fact that neither of those options was ultimately desirable does not mean that defendants did not have available legal remedies. Because defendants could resort to legal recourse, they cannot claim economic duress … . CRG at Arnot Mall, Inc. v Feehan, 2019 NY Slip Op 08467, Third Dept 11-21-19